LEGISLATION

Constitutional Amendment

Open Space, Farmland, and Historic Preservation
An amendment to Article VIII, Section II, of the State Constitution was approved by the electorate on November 3, 1998. Commencing July 1, 1999, the amendment dedicates $98 million in each fiscal year for the next 10 years (1999 to 2009) from the State sales and use tax revenues for the acquisition and development of lands for recreation and conservation purposes, for the preservation of farmland for agricultural or horticultural use and production, and for historic preservation, and to satisfy payments relating to bonds and other obligations issued for those purposes.

The amendment also dedicates up to $98 million each fiscal year, for up to 20 years thereafter (2009 to 2029), of sales and use tax revenues to satisfy any payments relating to bonds and other obligations issued for those same purposes.

Corporation Business Tax

P.L. 1999, c. 140 — Tax Benefit Certificate Transfer Program
(Signed into law on June 28, 1999) Clarifies the Corporation Business Tax Surrendered Tax Benefit Certificate Transfer Program, established pursuant to P.L. 1997, c. 334, which allows corporations to purchase the research and development credits and net operating loss deductions of new or expanding emerging technology and biotechnology companies in this State.

The bill imposes a cap limiting the total amount of tax benefits that may be transferred under the program to $50 million in fiscal year 2000 and $40 million in each subsequent fiscal year. Individual companies applying to "sell" tax benefits under the program are limited to a lifetime maximum of $10 million.

In addition, the measure: (a) defines eligibility requirements for businesses wishing to surrender tax benefits; (b) provides criteria for approving applications for transfers; and (c) establishes a method for allocating transfers among qualified prospective participants in cases where the total amount of tax benefits requested to be surrendered by approved applicants in a particular fiscal year exceeds the ceiling on total allowable transfers for that year. This act applies to tax years beginning on and after January 1, 1999.

Corporation Business Tax/ Gross Income Tax

P.L. 1999, c. 102 — Neighborhood and Business Child Care Tax Incentive Program
(Signed into law on May 6, 1999) Provides new tax credits to certain corporations based on their expenditures for child care facilities and also allows certain unincorporated businesses to fully deduct such expenditures for gross income tax purposes.

A corporation that is a member of a small/medium business child care consortium will be allowed a credit equal to 15% of its expenditures on child care center physical plant or facilities and a credit of 10% of its contributions, in cash or in kind, to a sponsor of a neighborhood-based child care center. The credit will apply to privilege periods ending on or after July 31, 1999 and before July 1, 2002.

An unincorporated business that is a member of a small/medium business child care consortium will be allowed to deduct, for gross income tax purposes, the amount of their expenditures on child care center physical plant or facilities, as well as the amount of their contributions, in cash or in kind, to a sponsor of a neighborhood-based child care center. These deductions are extended to members of partnerships or associations in proportion to the partner's share of the partnership expenditure or contribution. The deduction will apply to taxable years beginning on or after January 1, 1999 and before January 1, 2002.

Gross Income Tax

P.L. 1998, c. 79 — Single Member Limited Liability Companies
(Signed into law on August 14, 1998) Amends various sections of the New Jersey Limited Liability Company Act to provide for single member limited liability companies and to treat such companies as sole proprietorships for State income tax purposes unless the company is classified otherwise for Federal income tax purposes. The act became effective immediately and applies to all existing limited liability companies regardless of their formation date.

P.L. 1998, c. 113 — Holocaust Restitution
(Signed into law on October 20, 1998) Excludes from income amounts received by victims of the Nazi Holocaust as reparations or restitution for the loss of liberty or damage to health. Such compensation, whether recovered in the form of tangible or intangible property or as cash value in replacement of such property, payment of insurance policies purchased by Nazi Holocaust victims, and any accrued interest on such amounts, shall not be counted as income for New Jersey gross income tax purposes or for the purpose of determining eligibility for the Pharmaceutical Assistance to the Aged Program (PAAD). This act took effect immediately and applies to all property received after enactment.

P.L. 1998, c. 153 — Contribution Checkoff Amounts
(Signed into law on January 12, 1999) Increases the amounts specified for contribution to special funds made through checkoffs on New Jersey individual gross income tax returns from "$5, $10 or other" to "$10, $20 or other." The statute also changes the name of the "Battleship New Jersey Memorial Fund" to the "U.S.S. New Jersey Educational Museum Fund." The new law applies to tax years beginning on or after January 1, 2000.

P.L. 1999, c. 12 — Checkoff for Drug Abuse Education Fund
(Signed into law on January 25, 1999) Establishes the Drug Abuse Education Fund into which each taxpayer shall have the opportunity to contribute by indicating on his or her New Jersey gross income tax return that a portion of the taxpayer's tax refund or an enclosed contribution shall be deposited in this special fund.

All contributions to this fund will be appropriated to the Department of Education for distribution to non-governmental entities operating in the public interest that, utilizing law enforcement personnel, provide drug abuse education programs on a State-wide basis, such as, but not limited to, Project DARE (Drug Abuse Resistance Education).

This act took effect immediately, but remained inoperative until enactment of P.L. 1999, c. 21. The legislation applies to tax years beginning on or after January 1, 2000.

P.L. 1999, c. 21 — Coded Designations for Contribution Checkoffs
(Signed into law on February 8, 1999) Allows for the use of coded designations on the gross income tax return form to indicate to taxpayers their statutorily authorized options for making contributions to charitable funds. The legislation applies to tax years beginning on or after January 1, 2000.

P.L. 1999, c. 92 — Checkoff for Korean Veterans' Memorial Fund
(Signed into law on May 3, 1999) Allows gross income tax filers to contribute to the Korean Veterans' Memorial Fund by designating a portion of their refund or by making a donation with their gross income tax return. This act applies to tax years beginning on or after January 1, 2000.

P.L. 1999, c. 94 — Simplified Wage Tax Reporting for Employers of Domestic Workers
(Signed into law on May 3, 1999) Permits wage taxes withheld from remuneration for domestic services rendered to be reported and paid over to the Division of Revenue on a calendar year basis rather than on a quarterly (or more frequent) basis as formerly required.

The statute further simplifies the process of reporting and paying taxes withheld from the wages of household workers by including employer and employee contributions for unemployment compensation and disability benefits in the definition of withholding taxes, thereby allowing employers to combine such contributions with gross income tax withheld for reporting and payment purposes. Withholding returns and tax payments are due from employers of domestic workers on or before January 31 following the close of the calendar year.

This act took effect immediately and applies to all wages paid on and after January 1, 2000.

P.L. 1999, c. 116 — State Tuition Program Accounts, Education IRAs
(Signed into law on May 21, 1999) Allows earnings of qualified state tuition program accounts (e.g., NJBEST accounts) and educational individual retirement accounts to be deferred from New Jersey gross income until the earnings are distributed and excludes from income qualified distributions from qualified state tuition program accounts that are used for qualified higher education expenses. This act applies to taxable years beginning on or after January 1, 1998.

Local Property Tax

P.L. 1999, c. 63 —NJ SAVER and Homestead Rebate Act
(Signed into law on April 15, 1999) Establishes a new direct property tax relief program for New Jersey home-

owners and expands the existing homestead rebate for certain tenants.

The NJ SAVER component of the statute provides for an annual rebate to be issued to qualified New Jersey residents who own, occupy and pay property taxes on a home in this State which was their principal residence as of October 1 of the previous year. Residents of condominiums, co-ops and continuing care facilities may also be eligible for a NJ SAVER rebate.

The program will be phased in over five years, and will provide maximum rebates averaging about $600 when fully implemented. Rebates will be phased in at the rate of 20% of the maximum for 1998, 40% for 1999, 60% for 2000, etc. Because the amount of the NJ SAVER rebate is derived by multiplying the first $45,000 of the qualified property's equalized value by the equalized school tax rate for the municipality in which the home is located, actual rebate amounts will differ for each municipality.

Homeowners who qualify for both the homestead rebate and the NJ SAVER rebate will receive whichever rebate provides the greater benefit.

Tenants are not eligible for NJ SAVER rebates. However, this legislation extends homestead rebate eligibility to tenants under 65 who are not blind or disabled provided that their income does not exceed $100,000. Formerly such tenants qualified for a $30 homestead rebate only if income was $40,000 or less. Under the new law, homestead rebates for these tenants will be $30 for tax year 1998, $40 for tax year 1999, $60 for tax year 2000, $80 for tax year 2001 and $100 for tax year 2002.

P.L. 1999, c. 67 — Extension of Time for Filing Property Tax Reimbursement Applications
(Signed into law on April 16, 1999) Extends the deadline for filing property tax reimbursement applications to April 15, 1999. The extension applies only to tax year 1998.

Miscellaneous

P.L. 1998, c. 40 — ICF-MR Assessment
(Signed into law on June 30, 1998) Provides for an annual assessment of 5.8% of the gross revenue of every intermediate care facility for the mentally retarded (ICF-MR) in the State. The assessment must be paid to the Director of the New Jersey Division of Revenue on a quarterly basis. Proceeds will be used by the Division of Developmental Disabilities in the Department of Human Services to reduce the number of disabled persons awaiting placement in a community residence or program. The act took effect July 1, 1998.

P.L. 1998, c. 114 — Exemptions for Municipal Electric Utilities
(Signed into law on October 28, 1998) Exempts certain sales by municipal electric utilities from sales tax and from the corporation business tax. The act, targeted specifically to apply to the Butler Borough Municipal Corporation, took effect immediately and is retroactive to January 1, 1998.

P.L. 1998, c. 115 — Special Improvement Districts
(Signed into law on October 28, 1998) Authorizes municipalities to establish "special improvement districts" for the purpose of revitalizing the State's downtown areas; provides $5 million to establish a downtown business improvement loan fund for worthwhile municipal revitalization projects; and provides technical assistance for such projects from the Department of Community Affairs. This act took effect December 27, 1998.

P.L. 1999, c. 42 — Nonofficial Examination of State Tax Records
(Signed into law on March 12, 1999) Provides that any person violating the confidentiality provisions of R.S. 54:50-8 of the State Tax Uniform Procedure Law by examining records or files for any reason other than one necessitated by the performance of official duties shall be guilty of a disorderly persons offense. Persons who divulge, disclose or use confidential tax information will be guilty of a crime of the fourth degree.

Whenever records and files are used in the prosecution of a person for violating the provisions of R.S. 54:50-8, the defendant shall be given access to said records and files. The court shall review such records and files in camera and that portion of the court record containing the records and files shall be sealed by the court. Chapter 42 became effective upon enactment.

P.L. 1999, c. 71 — Shore Protection Fund
(Signed into law on April 28, 1999) Increases the amount annually credited to the Shore Protection Fund to $25 million. This act took effect immediately and applies only to fiscal years beginning after enactment.

P.L. 1999, c. 118 — Aid for Challengers of the NYC Personal Income Tax
(Signed into law on May 27, 1999) Authorizes the New Jersey Attorney General to represent, or to file an action on behalf of, affected New Jersey citizens who wish to challenge the repeal of the New York City personal in-

come tax for residents of New York State who reside in places other than New York City, but not for New Jersey residents who earn income in New York City. Appropriates $95 million for expenses incurred in providing such assistance.

P.L. 1999, c. 152 — Garden State Preservation Trust Act
(Signed into law on June 30, 1999) Establishes statutory authority for efforts in pursuit of certain conservation objectives mandated by a recent amendment to Article VII, Section II of the State Constitution and provides a stable, dedicated source of funding for such efforts out of revenue from the sales and use tax.

The statute exempts property and income of the Trust from all taxes and special assessments of the State (except transfer inheritance and estate taxes) and provides for compensation to municipalities for tax revenues lost by reason of acquisition and ownership by the State of lands certified exempt from property taxes due to their use for conservation and recreation purposes.

Multiple Taxes

P.L. 1998, c. 106
(Signed into law on September 14, 1998) Implements various recommendations of the Tax Advisory Group established by the State Treasurer in 1994 to study State tax issues.

1. ***Deficiency Assessments***
   Allows taxpayers who have paid an assessed deficiency within one year after the expiration of the period allowed for filing a protest, but who have not protested or appealed that assessment, to file a claim for refund. Applies to return periods which begin on or after January 1, 1999.

2. ***Hedge Funds***
   Provides that income or losses which a nonresident taxpayer receives from a business entity located in New Jersey are not deemed to be derived from New Jersey sources if the business entity's only activity is the purchase, holding or sale of intangible personal property, such as commodities or securities and such intangible property is not held for sale to customers. Applies to taxable years ending after enactment.

3. ***Penalty Rules***
   For return periods which begin on or after January 1, 1999:
   - Amends the State Tax Uniform Procedure Law so that the penalty for failure to file a tax return is based on the amount of the underpayment of tax rather than on the entire tax liability; and
   - Caps the corporation business tax underpayment penalty at 25% of the underpayment in conformity with the State Tax Uniform Procedure Law.

4. ***Gross Income Tax Estimated Payments***
   For return periods beginning on or after January 1, 1999:
   - Raises from $100 to $400 the tax threshold above which quarterly estimated tax payments are required; and
   - Requires certain estates and trusts to make estimated tax payments; and
   - Modifies the method by which the penalty for underpayment of estimated tax is determined.

5. ***Corporation Business Tax Estimated Payments***
   For return periods beginning on or after January 1, 1999, modifies the method by which the penalty for underpayment of estimated tax is calculated.

Sales and Use Tax

P.L. 1998, c. 99 — Direct Mail Advertising Services
(Signed into law on September 4, 1998) Amends the New Jersey Sales and Use Tax Act to more accurately describe the kinds of direct-mail advertising services that are subject to sales and use tax. The amendment replaces the general and indistinct term "advertising services" with the more precise phrase "direct-mail advertising processing services in connection with distribution of advertising or promotional material" to recipients in New Jersey. This act took effect on November 1, 1998.

P.L. 1998, c. 118 — Charity Shops
(Signed into law on November 9, 1998) Allows certain charitable and public safety organizations to make tax exempt sales of donated property at shops where substantially all of the work is done by volunteers and where substantially all of the merchandise being sold has been received by the exempt organization as gifts or contributions. This act took effect on February 1, 1999.

COURT DECISIONS

Corporation Business Tax

Compensation
Seventeen Thirty Corp. v. Director, Division of Taxation, decided April 16, 1999; Tax Court; No. 003648-97. The president of plaintiff was the sole shareholder and served as store manager for fiscal years commencing October 1, 1988 through October 31, 1992. Not only was the president compensated through regular salary, but he also supplemented it by writing checks to himself for varying amounts at varying times during each year based upon the availability of cash in plaintiff's business. Plaintiff neither withheld New Jersey gross income tax or Federal income tax nor did it issue W-2 Forms or other reporting forms reflecting these supplemental payments. However, the corporation business tax returns reported the supplemental payments as officer compensation deductions and the president reported the supplemental payments as other income on his New Jersey gross income tax returns. The Division of Taxation disallowed the supplemental payments as deductions because there was no objective evidence to characterize the nature of the payments as compensation rather than the distribution of earnings and profits, dividends.

The Tax Court ruled that New Jersey's Corporation Business Tax Act's references to the Federal income tax principles permitted the decisional law under the Internal Revenue Code to be relevant in determining whether the payments at issue were compensation under the Corporation Business Tax Act. The Tax Court then adopted the two-pronged test for deductibility espoused in *Elliots, Inc. v. Commissioner*, 716 F.2d 1241 (9th Cir. 1983). The test's first prong requires an inquiry into whether the amount of compensation is reasonable. The second prong requires that the payments must be entirely for services. The *Elliots* court noted that this second prong may be difficult to establish due to its subjective nature and, in that case, the answer may be inferred from the outcome of the first prong's reasonableness test.

Applying the *Elliots* test, the Tax Court held that the payments at issue were reasonable and constituted deductible compensation rather than dividends. The Court found the following facts to be significant in arriving at its determination: (1) The president had no sophisticated understanding of the Internal Revenue Code, New Jersey Gross Income Tax Act, or the Corporation Business Tax Act; (2) the president believed he earned the corporation's additional cash from his long work hours; (3) the defendant did not dispute that the total payments to the president constituted reasonable compensation; and (4) the plaintiff paid minimal dividends for four of the five years at issue. Additionally, the Court noted the *Elliots* court's finding that a corporation is not required to pay dividends.

Gross Income Tax

Basis for Sale of Partnership Interest
Koch v. Director, Division of Taxation, decided January 14, 1999; Supreme Court of New Jersey; No. A-135 September Term 1997. The appeal involved the tax treatment under the New Jersey Gross Income Tax Act (the Act) of the taxpayer's gain realized from the sale of his partnership interest. The question was whether the cost basis of that interest should be the purchase price or the Federal adjusted basis (purchase price less losses deducted on Federal income tax returns). The deducted losses provided the taxpayer with a Federal income tax benefit. However, because the losses were not deductible on the taxpayer's New Jersey gross income tax returns, they provided no tax benefit under the Act.

Koch filed a complaint with the Tax Court, asserting that the Act does not require a taxpayer to reduce the basis of his partnership interest by losses that are not deductible under the Act. The Tax Court disagreed and concluded that, in determining gain or loss under the Act, adjusted basis for Federal income tax purposes must be used and no exception is permitted even where the taxpayer was unable to deduct partnership losses. *Koch v. Director, Div. Of Taxation*, 15 N.J. Tax 387, 395 (Tax Ct. 1995). The Appellate Division affirmed in an unpublished, *per curiam* opinion substantially for the reasons stated by the Tax Court.

The Supreme Court granted certification. The Supreme Court held that in calculating taxable income from the disposition of property under the Act, the basis cannot be the Federal adjusted basis where that basis has been reduced by losses that are not deductible under the Act. Any income tax imposed on an amount greater than the taxpayer's economic gain (in this instance, sale price less purchase price) represents a tax on a return of capital, a result not intended by the Legislature.

The Supreme Court stated that the Division's position ignores the Federal accounting and nonrecognition provisions of section 5-1c of the Gross Income Tax Act. By including reference to Federal methods of accounting or nonrecognition provisions of the Internal Revenue Code,

the Legislature explicitly intended to incorporate Federal income tax concepts. Further, Koch's calculation of gain conforms to section 5-1c's directive to use methods of accounting allowed for Federal income tax purposes to determine gain or loss for New Jersey gross income tax purposes. Under the Federal method of accounting, losses not passed through to a partner would not reduce the partner's basis, and gain would be determined simply by computing the difference between a partner's cost basis (unreduced by partnership losses) and proceeds received from the sale. Accordingly, the accounting method allowed for Federal income tax purposes does not require the use of Koch's Federal adjusted basis to compute his gain.

Various Deductions

John W. Dantzler, Jr. and Kathleen M. Dantzler v. Director, Division of Taxation, decided June 1, 1999; Tax Court; No. 006040-96. This case concerned eight separate issues involving partnership deductions, deductions for personal transactions, and the credit for taxes paid to other jurisdictions on plaintiff's gross income tax (GIT) return.

Partnership Deductions

The query is whether the following items, which are not ordinarily deductible on a New Jersey gross income tax return, are deductible by a partnership in calculating its distributive share of partnership income where they are considered ordinary business expenses.

- Political Contributions – The Tax Court ruled that under the Gross Income Tax Act, a partnership's political contribution may be deductible by the partners where there is demonstrated some specific nexus between the political contribution and the partnership's business. As plaintiff could not provide adequate proof linking the contribution to conduct of the partnership's business, the Court disallowed the claimed deductions.

- Miscellaneous Expenses – The Court disallowed the claimed deductions because plaintiff could not prove what the expenses were and why they were deductible.

- Medical Expense Deductions – The partnership allocated $2,534 of medical insurance expense to the plaintiff that was consistent with the allocations to all but 11 of the 75 partners who the Court found were either qualified or did not elect to participate. It was not known whether or to what extent the allocation represented either the partnership's actual expenditures or was related to the plaintiff.

  The Court ruled that the medical insurance premium deductions are allowed to the extent that they are for all partners and employees and to the extent that the specific premiums or contributions for plaintiff exceed the Gross Income Tax Act's two percent requirement, but that they are not deductible in calculating plaintiff's distributive share of partnership income.

- Pension Expense Deductions – Plaintiff's partnership maintained a defined contribution plan for its eligible partners and staff. Although the plan had a 401(k) portion and a non-401(k) portion (Keogh), only the non-401(k) is at issue. Participation in the non-401(k) portion was not voluntary and was required of all eligible personnel. Only the partnership made contributions to the non-401(k) based upon a specified percentage of the person's allowable compensation.

  The Court held that the pension contributions are allowed to the extent they are for all personnel. However, those contributions specific to plaintiff are not deductible on his gross income tax return.

Personal Expenditures

- FICA Taxes – Plaintiff deducted Federal self-employment tax (FICA) attributable to being a partner. The Court held that FICA taxes are not deductible under the Gross Income Tax Act because they are paid by the individual and not the partnership. The Court noted that a self-employed individual was not permitted to deduct FICA because it is a tax on income.

- Interest on Loan – The partnership agreement required plaintiff to provide capital to the partnership. Prior to approximately May 1992, plaintiff borrowed the amount from the partnership and paid interest on such loan. After approximately April 1992, plaintiff borrowed from Citibank who paid the funds directly to the partnership to satisfy plaintiff's loan from the partnership. The partnership guaranteed repayment of the Citibank loan and paid the interest on behalf of plaintiff. The Court noted that the interest amounts on the aforementioned loans would otherwise have been distributed to plaintiff by either a cash payment or added to his capital account.

  The Court held that although the interest was not considered a deductible expense connected to net profits from business, as it was not a partnership obligation, it may be deductible. The Court found that this interest was plaintiff's personal expense connected to his partnership capital contribution requirements and the situation was analogous to investment interest that is deductible to a stocks and bonds investor whose business is to invest in stocks and bonds. Therefore, the Court

permitted plaintiff to deduct the interest from plaintiff's distributive share of partnership income. The Court reasoned that a partner should be allowed to deduct partnership expenditures required for participation in the partnership from his partnership income.

- Loss on the Sale of a Home – Plaintiff realized a gain on the sale of a personal residence and from the sale of securities attributable to his share of partnership gains. From this gain, plaintiff deducted a realized loss from the sale of another personal residence.

  Following the law of *Baldwin v. Director, Division of Taxation*, 10 N.J. Tax 273 (Tax 1988), *aff'd ob. per curiam*, 237 N.J. Super. 327 (App. Div. 1990) that personal losses are not deductible from personal gains under the Gross Income Tax Act, the Court disallowed the deduction for the loss.

Credit for Taxes Paid to Other Jurisdictions Calculation
On their California income tax return, plaintiff claimed deductions for the FICA tax, the medical insurance expense, and the pension payment that constituted their California allocable amount. On their New Jersey gross income tax return, plaintiff claimed the credit for taxes paid to California, but did not deduct the aforementioned expenses from the numerator of the credit fraction.

In calculating the credit for taxes paid to California, the Court held that the numerator (California share) of the credit fraction must be reduced by expenses not subject to tax in California and should not be deducted in the denominator (income taxed in New Jersey).

Insurance Retaliatory Tax

Treatment of Surtax as a Special Purpose Assessment
Liberty Mutual Insurance Co., Liberty Mutual Fire Insurance Co. v. Director, Division of Taxation, decided July 21, 1998; Tax Court Nos. 006043-96 and 000258-97. These cases involve the issue of whether the FAIR Act Private Passenger Automobile Surtax collected in 1990, 1991 and 1992 is a special purpose assessment excludible from the taxpayers' New Jersey retaliatory tax base under N.J.S.A. 17:32-15. By opinion and judgment dated July 21, 1998, the Tax Court granted the plaintiffs' summary judgment motion and denied the State's cross motion on this issue (the State prevailed on the estoppel issue raised by the plaintiffs).

Local Property Tax

Non-profit Corporation Not Exempt from Property Tax as an Historic Site
Black United Fund of N.J., Inc. v. City of East Orange, decided July 20, 1998, Tax Court of N.J. Black United Fund of N.J., a nonprofit 501(c)(3) Federal income tax exempt corporation, was not property tax exempt as an historic site under N.J.S.A. 54:4-3.52, as Green Acres per 54:4-3.64, or as a charitable organization according to 54:4-3.6 on or before the statutory October 1, 1995 pretax year assessment/exemption date for tax year 1996.

In reviewing the claim of historic site, the New Jersey Tax Court recalled the 1991 State Supreme Court's finding in *Town of Morristown v. Woman's Club of Morristown,* that, unlike other exemptions, historic exemption had no actual and exclusive use criteria but required only ownership by a nonprofit corporation and DEP certification as an historic site. Although organized under New Jersey law as a Title 15 nonprofit corporation in August 1980 and despite a Deed of Historic Preservation Restriction recorded on May 29, 1996 by the DEP, historic site designation was not actually issued by DEP until July 8, 1997. The Tax Court referred to *Ironbound Educational and Cultural Center, Inc. v. City of Newark*, in which the 1987 State Superior Court denied exemption to an historic site determined as such subsequent to its respective October 1 pretax year assessment date. The Tax Court also held that the listing in 1980 of the United Fund's mansion on the National Register of Historic Places and receipt of State Historic Preservation Officer Certification were Federal designations and so did not fulfill the exemption requirements of N.J.S.A. 54:4-3.52.

Considering the Green Acres claim, again, as above, the prerequisite DEP certification of public, recreational, conservational use was not obtained until after October 1, 1995 and, therefore, was not applicable to tax year 1996. In rejecting the claim for Green Acres, the Court reminded us that DEP is not empowered to grant Green Acres exemption, rather its authority is to certify qualifying public purpose.

Finally, the Tax Court looked at the claim for charitable purpose exemption. It noted the eligibility conditions of 54:4-3.6, as previously summarized by the State Supreme Court, included being organized exclusively for exempt purpose; used actually and exclusively for exempt purpose; and operated and used in a nonprofit capacity. The Tax Court utilized *Planned Parenthood of Bergen County, Inc. v. Hackensack City*, 12 N.J. Tax 598, 610 n.6 (Tax Court 1992), aff'd, 14 N.J. Tax 171 (App. Div.

1993) where "organized" was ruled to pertain only to the "entity's organizational documents, its corporate charter" as the guide in deciding if the Black United Fund was structured exclusively for exempt purpose. In drawing its conclusion, the Court also reviewed *1711 Third Ave., Inc. v. City of Asbury Park,* 16 N.J. Tax 174, 182 (Tax Court 1996). It found that United Fund's certificate of incorporation and bylaws, both of which stated purposes were to create a fund to distribute grants to other Federal tax exempt organizations supporting the African American community, while commendable, were not organized exclusively for exempt purposes under 3.6. Though the Fund additionally indicated it operated exclusively for charitable, religious, educational purposes within the meaning of 501(c)(3) of the Internal Revenue Code. This Court reiterated earlier courts in that "Federal income tax exemption standards have no relation to state law governing property tax exemption." That qualification alone is not sufficient to meet the standards of the New Jersey statute. *See Paper Mill Playhouse v. Millburn Twp.*, 95 N.J. 503, 529 n. 2, 472 A.2d. 517 (1984) & *City of Trenton v. State,* 65 N.J. Super. 1, 11, 166 A.2d 777 (App. Div. 1960).

Added Assessment Law

Seventy Five P-B Corporation v. Town of Phillipsburg, decided February 19, 1999; Tax Court; No. 000205-98. Plaintiff appealed an added assessment imposed for nine months of 1997 on a commercial building located in Phillipsburg. Construction on the improvement was completed on March 21, 1997. The added assessment was in the full amount of $488,800, and an allocated amount of $366,600 for the nine-month period. Plaintiff did not dispute the amount of the assessment, but considered it improper because the improvement qualified for exemption, commencing April 1, 1997 under the Five-Year Exemption and Abatement Law, N.J.S.A. 40A:21-1 to 21, and under the municipal ordinance adopted pursuant to the Five-Year Law. Defendant acknowledged that the improvement qualified for exemption under the Five-Year Law, but contended that such exemption could not commence until January 1, 1998. Defendant sought a summary judgment to dismiss the appeal; plaintiff cross-moved for summary judgment based on its interpretation of the commencement date of the five-year exemption.

On October 1, 1996, Phillipsburg adopted an ordinance declaring the Town an Urban Enterprise Zone, an "area in need of rehabilitation" as defined in N.J.S.A. 40A:21-3(b). The ordinance declared that "improvements to existing structures shall be exempt from assessment for a period of five years following completion of the improvement." Phillipsburg denied plaintiff's application for exemption for tax year 1997, granting the exemption effective January 1, 1998 for a five-year period beginning on that date. The Assessor imposed the added assessment in dispute. Plaintiff filed a timely appeal with the Warren County Board of Taxation, which affirmed the added assessment. This Tax Court appeal followed.

Defendant asserted that the Five-Year Law neither provides for nor contemplates the granting of an exemption other than for full tax years and, therefore, contended that imposition of an added assessment for nine months of 1997 was entirely consistent with, and permitted by, the Law. It asserted that the five full years to which the Five-Year Law expressly refers commenced on January 1, 1998 and that, in the absence of a statutory provision requiring or authorizing exemption or abatement between the date of completion of the improvement and the commencement of the first full year after the date of completion, the exemption or abatement is inapplicable during that time period, and the improvement is fully taxable.

Defendant's motion for summary judgment was granted and plaintiff's cross-motion for summary judgment was denied. Defendant's interpretation of the Five-Year Law was consistent with the principle that qualification for tax exemption or abatement during a tax year does not result in a change of assessment for that tax year. The Court cited *City of Asbury Park v. Castagno Tires*, 13 N.J. Tax 488 (Tax Court 1993) which states: "As a general rule, absent an appeal, the taxable status of property is fixed as of October 1 of the pre-tax year; subsequent conversion to an exempt use does not render the property exempt for that year." The Court noted that interpreting the Five-Year Law to prohibit "interim" added assessments would be an "inappropriate expansion of the holding" in *City of Newark v. Essex County Bd. of Taxation*, 309 N.J. Super. 476 (App. Div. 1998). The Legislature did not authorize extension of the Five-Year Law exemption to the interval between completion of an improvement and the next January 1. The Court rejected plaintiff's contention that the exemption period commences with the first day of the month next following completion of the improvement. It noted that N.J.S.A. 40A:21-11(a) provides that "All tax agreements entered into by municipalities pursuant to Sections 9 through 12 of P.L. 1991, c. 441 shall be in effect for no more than the five full years next following the date of completion of the project." The nine month added assessment was deemed proper. N.J.S.A. 1:1-2 defines the term "year" as used in any statute as "a calendar year." The Five-Year Law defines that period as five full (calendar) years. The improvement was subject to taxation in accordance with the normal local property tax

procedures otherwise applicable to property. These procedures include the imposition of an added assessment, a conclusion mandated by the New Jersey Constitution and the Five-Year Law.

Municipalities Lack Standing to Lower Assessments
A.G. Opinion 99-0050, March 23, 1999. N.J.S.A. 54:3-21 provides, in part, "A taxpayer … or a taxing district which may feel discriminated against by the assessed valuation of property in the taxing district, or by the assessed valuation of property in another taxing district in the county, may on or before April 1 appeal to the county board of taxation … taxpayer or taxing district may on or before April 1 file a complaint directly with the tax court…."

In reviewing the appeal statute, the A.G.'s Office explained, "Where a statute creates a cause of action, and identifies the requirements for bringing the action, as was done by N.J.S.A. 54:3-21, those requirements must be met." Citing several court decisions, the A.G. opinion reiterated that the right to appeal is statutory and the appellant is required to comply with all applicable statutory requirements.

Concluding that municipalities lacked standing to reduce assessments, the opinion relied on the Tax Court's reasoning in *Appeal of Monroe Twp.*, 16 N.J. Tax 261 (1996). A taxing district is not discriminated against by an assessment in the municipality that is too high, only by an assessment that is too low. Again citing prior case law, the opinion concurred that a municipality's appeal standing was limited to correcting underassessments. However, administrative remedy is available to assessors in that they can informally ask the County Board of Taxation to lower assessments. The County Tax Board can also, upon their own initiative, revise and correct assessments prior to their certification of the tax list. Finally, if administrative reduction is not possible for reason of timeliness, etc., taxpayers have the right to request a lesser assessment via the statutory appeal process.

Applicability of the Freeze Act
Rockstone Group v. Lakewood Township, decided March 24, 1999; Tax Court of New Jersey; No. 004614-97. Appeal involves the Freeze Act (N.J.S.A. 54:51A-8) and whether it applies following entry of a stipulation of settlement between plaintiff and defendant upon the 1997 assessed values for two vacant land parcels assessed at $327,000 and $372,000 respectively. A Tax Court Judgment was entered on October 19, 1998 for tax year 1997 to reduce the assessments to $230,000 per lot. The stipulation was silent as to Freeze Act application, since the parties were unable to settle that issue and had agreed to litigate it in a later proceeding.

Plaintiff's attorney then filed an application for judgment to "freeze" the assessments for tax years 1998 and 1999. Lakewood Township sought to avoid the freeze for 1998. It claimed that the subject property's value had substantially increased because it originally had a municipal site plan approval for a 54,800 square foot retail center. The land was granted conditional municipal preliminary and final site plan approval for construction of a 132-unit apartment complex on July 15, 1997, as memorialized by a Lakewood Township resolution. Approval was given subject to "posting a performance bond for any improvement in connection with this application, complying with all conditions as required by Federal, State or local law and obtaining all other approvals as required by law." Plaintiff submitted that, since the resolution required several governmental regulatory approvals not granted until after the valuation date of October 1, 1997 for the 1998 freeze year, the property essentially had no approvals at that time, and thus the Freeze Act should apply. Approvals included DOT and CAFRA permits, Municipal MUA approval, and County Soil Conservation District certification. Plaintiff asserts that the standard for "increase in value" should be final approval as defined in the Municipal Land Use Act (N.J.S.A. 40:55D-4). In opposition, the municipality's appraiser concurred with the assessor's conclusion that obtaining final municipal planning board approval for development, even with additional permits and approvals pending, "*in and of itself* causes a substantial and meaningful increase in the value of vacant land."

The property rights that the legislature conferred on the developer automatically upon final approval of a site plan are a significant factor. During the approval period the developer is protected against rezoning and retains all rights encompassed in the preliminary site plan approval. The economic reality is not whether every condition of final site plan approval is satisfied, but the perception in the real estate market that a protected right has been conferred on the property which has value. Defendant's experts observed that "most real estate appraisers recognize and reflect the increase in value of unimproved land created by obtaining municipal approvals" by means of adjustments. The assessor concluded that a significant increase in value resulted from the grant of approvals for the apartment complex, based on the taxpayer's appraisal report for the 1997 tax year, in which he had adjusted two comparable sales downwards by 25% due to their lack of approvals.

The municipality bears the burden of showing that the Freeze Act should not apply. In order to have defeated the freeze and thus been entitled to a plenary hearing, the municipality must have demonstrated a change in value from an internal or external change that materialized after the assessment date of the base year. The change must substantially and meaningfully increase the value of the property.

The Court found that the planning board approvals of July 15, 1997 constituted an external change subsequent to the assessment date of the base year. The municipality had submitted evidence to create a prima facie demonstration of a change in value. The Court ruled that the municipality was entitled to the plenary hearing to determine whether the change in value was sufficient to deflect the freeze that the plaintiff sought. The Court's decision was not a determination on the merits of the taxpayer's Freeze Act application, but only that the municipality had presented a prima facie allegation and provided sufficient evidence to proceed with the plenary hearing. The plenary hearing is a full evidential trial that will only address the increased valuation, if any, attributable to the site plan approval.

Exemption for Greenhouse Affirmed

Van Wingerden v. Lafayette Twp., decided April 16, 1999; N.J. Tax Court, on remand from N.J. Superior Court, Appellate Division. The Farmland Assessment Act at N.J.S.A. 54:4-23.12(a) taxes structures on agricultural or horticultural land in the same way as taxable nonfarm structures, but exempts single-use agricultural or horticultural facilities, that is, property employed in farming operations, used for growing or storage which is readily disassembled and separately marketable from the farmland and buildings, such as readily dismantled silos, greenhouses, grain bins, manure handling equipment and impoundments, except structures enclosing space within their walls for housing, shelter, or working, office or sales space are not to be exempted.

The issue on remand was whether a greenhouse was disqualified from property tax exemption because it enclosed a space within its walls used for working, office or sales space.

The disputed building was divided into two sections — the main greenhouse and the shipping house; but the sections were structurally and functionally integrated. The main greenhouse was utilized for growing flowers with an area for storing equipment used in horticultural operations. The shipping house held the boilers; heat pumps; water tanks; heat shield, ventilation, and watering controls servicing the main greenhouse. The shipping house also had a refrigerated cool box for flower storage, tables for grading and sorting flowers, a workbench, a tool storage area, a desk, chair, and phone. For purposes of deciding tax status, the Court treated the greenhouse and shipping house which shared a common wall and entryway as one structure which was to be either exempt or taxable in its entirety.

In that the meaning of the phrase "working, office or sales space" was unclear and had not been clarified by prior case law, the Tax Court sought to interpret it consistent with the Legislature's intent by resorting to the legislative history of the statute. The Court reviewed the N.J. State Board of Agriculture's Report on "Agricultural Economic Recovery & Development Initiative" and the resulting Senate Bill that led to the enacting of P.L.1993, c. 251 which exempted single-use agricultural or horticultural facilities. The Court also reviewed the basic terminology of the amended Farmland Assessment Act and, although not specifically defined, equated "farming operations" with agricultural/horticultural use of land and buildings. It went on to note that agricultural/horticultural use included animals, plants, fruits, nursery, floral, greenhouse products, etc. "produced for sale" and "grown for market, either retail or wholesale" and encompassed within those meanings "making crops ready for sale, including storage pending sale." However, making a crop ready for sale did not permit altering the crop's raw state by processing it into an end product as, for example, turning cranberries into juice. From the Legislature's exempting of specific structures such as silos, used only for agricultural purposes, and its designation of disqualifying space, it was concluded that property tax relief was not meant for structures having purposes ancillary to agricultural or horticultural uses. The Court then determined that sales of agricultural/horticultural crops in or from an exempt structure did not prohibit exemption, but a structure having enclosed sales space would be prohibited.

As explained by the Court, an area in the greenhouse used for purposes not essential to the growing or storage of flowers, such as space used for the sale of flowers, floral displays, flower pots, vases or other merchandise or services would constitute disqualifying "sales space." Van Wingerden sold primarily to florists and florist distributors and did not encourage retail business. No sales staff was employed at the greenhouse. It was not visible from the road and there were no signs, advertising, or floral displays. Retail sales amounted to less than one percent of the total business. The Court found that the greenhouse contained no sales space. The Court also held that a single desk was not an office and the space it occupied was not

"office space." Van Wingerden's business, tax and billing records, computer, copier etc. were maintained at his residence. Disqualifying "working space" again meant space used for purposes inessential for growing or storing crops such as preparing floral displays. The Court ruled that grading, sorting and treating flowers with preservative were essential activities in making the flowers ready for sale. The work performed on the greenhouse walkways consisted of planting, maintaining and harvesting flowers. The storage area held equipment used in growing and harvesting flowers. The "single-use" of the structure, the growing of flowers, was not violated. Exemption was affirmed.

Miscellaneous

Division's Duty to Provide Notice of Changes to Tax Statutes

Schirmer-National Co. v. Director, Division of Taxation, decided August 17, 1998; Tax Court No. A00348-96. The Tax Court followed its decision in *Aetna Burglar & Fire Alarm Co. v. Director, Div. of Taxation,* 16 N.J. Tax 584 (1997), that alarm monitoring services carried through telephone telecommunications are subject to sales tax. Plaintiff also argued that these services should not be subject to tax until the time the Division provided proper notice of the tax law changes. The court ruled that taxpayers are "put on notice of legislative enactments on the date the legislation becomes effective." Consequently, the Division of Taxation was not obligated to provide taxpayers with notice of changes in the tax law.

Timely Protests

Frank Scallo v. Director, Division of Taxation, decided July 10, 1998, clarified August 26, 1998; Tax Court No. 000387-1998. Plaintiff was a shareholder and employee of Shore Auto Service, Inc. In 1992, the Division assessed sales and use tax against the corporation for the period October 1986 to December 1989. The corporation did not challenge the assessment. On June 28, 1996, the Division sent plaintiff a Notice of Finding of Responsible Person Status which granted the right to an administrative hearing if the plaintiff applied for a hearing within 90 days of the notice. On January 16, 1997, the Division filed a certificate of debt against the plaintiff and a Warrant of Execution was issued on February 1, 1997. On April 23, 1997, plaintiff requested an administrative hearing challenging his status as a responsible person for the period October 1986 to December 1989. Plaintiff's request was denied due to its untimeliness on November 14, 1997. Thereafter, plaintiff filed a timely complaint with the Tax Court on February 10, 1998 claiming that the request for an administrative hearing was timely and that the 1996 assessment was void *ab initio*.

The Tax Court held that plaintiff's request for an administrative hearing was untimely because the April 23, 1997 request for a hearing was more than 90 days after the Division's June 28, 1996 mailing of the Notice of Responsible Person Status and that the filing of the certificate of debt does not extend plaintiff's time to request an administrative hearing pertaining to the underlying tax liability. The court added that the certificate of debt may not be challenged under Rule 4:50-1 because this rule deals with the correction of liability determinations which are the result of litigation, not Division methods involving the collection of tax liabilities. Finally, the court ruled that the 1996 assessment was not void *ab initio* even if made beyond the four (4) year statute of limitations because plaintiff's failure to file a timely request for an administrative hearing barred him from raising this defense.

Private Debt Collection Agencies

Lonky v. Municipal Tax Collection Bureau Inc. and New Jersey State Department of Treasury, Division of Taxation, decided October 16, 1998; Appellate Division; No. A-0512-97T3. In 1992, the State enacted legislation enabling the Division to hire private agents to discover tax obligations and collect payments from taxpayers. (See N.J.S.A. 54:49-12.1 to .5) Thereafter, the Division contracted with the Municipal Tax Collection Bureau Inc. (MTB) where MTB would identify and collect taxes from non-reporting taxpayers and be remunerated pursuant to a contingent fee arrangement.

MTB identified plaintiff, who was neither registered for New Jersey taxes nor filed New Jersey tax returns, as a person with potential tax liability after it discovered information that plaintiff owned and sold commercial property in New Jersey. Subsequently, plaintiff filed a complaint claiming the Division's contract with MTB was unconstitutional and invalid. The trial court's decision granted summary judgement in favor of MTB and the Division. Plaintiff appealed.

The Appellate Court affirmed the trial court's decision. Furthermore, the Court noted that (1) statutory authority exists for MTB's debt collection practices, (2) MTB has no authority to and does not assess taxes, and (3) the legislature did not expressly prohibit the Division from entering into contingent fee arrangements with private tax collectors. The Court concluded that there was "no overriding public policy or legislative prescriptions that would render the contract with MTB invalid, particularly given

the express statutory authority therefor and the substantive and procedural controls imposed by the Division."

Reclaiming Mistaken Refunds
Playmates Toys, Inc. v. Director, Division of Taxation, decided December 8, 1998; Appellate Division; No. A-170-97T5. Plaintiff filed a refund claim for time periods that were barred by the statute of limitations. However, the Division mistakenly granted the refund. Realizing its mistake, the Division issued a final determination directing plaintiff to return the erroneous refund from which plaintiff appealed. The Tax Court ruled that plaintiff must return the money because the issuance of the refund was not tantamount to the Division's waiver of its ability to recoup the overpayment. Plaintiff appealed.

The Appellate Court held that although the Division has no express statutory power, it does have a common law inherent power to recoup mistaken disbursements. In support of its holding, the Court cited non-tax cases where courts had upheld the government agency's inherent power to correct its mistakes.

Subject Matter Jurisdiction
James Construction Company, Inc. v. Director, Division of Taxation and Commissioner, Department of Labor, decided June 22, 1999; Tax Court; No. 005268-98. The Court ruled that the Tax Court does not have jurisdiction to hear unemployment compensation contribution cases. The Court found that neither the statutes, regulations, nor the Tax Court jurisdiction statutes grant judicial review by the Tax Court.

Sales and Use Tax

Sales or Repairs, Alterations or Conversion of Ships
Maher Terminals Inc. v. Director, Division of Taxation, decided September 3, 1998; Tax Court No. 0003495-1997. Plaintiff operated a stevedoring/port terminal business for commercial ships, barges, and other vessels at its marine terminal facility in Port Elizabeth, N.J. Plaintiff's computer equipment is located at a building which is 14 miles away from the marine terminal facilities. The computer equipment is connected by fiber optic cable to computer terminals at the marine terminal facilities and is used to process data such as the containers' number, weight, contents, destination, name of the shipping vessel and date of sailing and anticipated arrival, special handling requirements, compliance with export requirements, etc. These computers plan where outgoing containers will be placed on the ships, track the storage location of the containers, and instruct plaintiff's employees as to where the containers will be stored and the order in which they will be loaded. Additionally, computer terminals are located on straddle carriers, equipment which straddles a cargo container, so that it can be lifted and moved efficiently, in order to maximize their efficiency and to coordinate container movement (pick up and drop off) after considering priority of the move.

At issue is whether plaintiff's computer equipment qualifies for the N.J.S.A. 54:32B-8.12 sales tax exemption. This exemption applies, *inter alia*, to "…machinery, apparatus and equipment for use at a marine terminal facility in loading, unloading and handling cargo carried by those commercial ships, barges and other vessels, and storage and other services rendered with respect to such loading, unloading and handling cargo at a marine terminal facility …."

The court ruled that the computer equipment did not qualify for the exemption because it was not directly used in the loading, unloading, and handling of cargo. The court found that the computer's use, information processing, was too remote from the actual movement of the cargo, i.e., activities of the straddle carriers, forklifts, cranes, and other movement equipment. The court reasoned that it was not the Legislature's intention to exempt such computer equipment.

Refund Claims
Amplicon, Inc. v. Director, Division of Taxation, decided September 18, 1998; Tax Court; No. 000413-98. Pursuant to an audit, the Division issued a notice of assessment informing plaintiff that it owed sales and use tax. Plaintiff protested the assessment and presented documentation requesting an $87,646 reduction in tax. Per its June 28, 1995 notice, the Division granted the entire requested reduction and recomputed the remaining sales and use tax liability. Plaintiff paid the assessment by check dated July 18, 1995. Subsequently, in a letter dated May 30, 1997, plaintiff filed a refund claim for a portion of the sales and use tax paid by the July 18, 1995 check. The Director denied the refund claim on the grounds that it was untimely filed.

The sole issue in front of the Court was whether plaintiff may seek a refund of assessed taxes more than ninety days after the taxes were assessed and paid without protesting the assessment. The Court's analysis of the statutes revealed an apparent conflict between N.J.S.A. 54:32B-20(a), which permits a taxpayer to file a refund claim within four years from the payment of tax, and N.J.S.A. 54:32B-19 and 54:3B-21, which grants the taxpayer ninety days from the date of the Division's assessment to

request a hearing or file an appeal to Tax Court. The Court found that N.J.S.A. 54:32B-20(b) resolved this apparent conflict by stating that the four year refund claim period does not apply to the situation where payments were made pursuant to an assessment and the taxpayer had a hearing or failed to file for a hearing or appeal. Therefore, the Court held that the four year period for filing a refund claim is inapplicable in the instant case and upheld the Director's decision that plaintiff's claim for refund was out-of-time. The Court noted that audits would never close if extended statute of limitations were permitted in cases like this as there could be repeated and endless attempts to seek refunds.

Bulk Sale Provision

M.S. Appliance Service, Inc. v. Director, Division of Taxation, decided September 25, 1998; Tax Court; No. 3646-97. On or about July 1, 1994, plaintiff purchased from Mr. Service, Inc. (hereinafter Mr. Service) its appliance repair business for $193,000. The purchase consisted of the trade name, customer lists, and fixed assets, but not the inventory. At the time of the sale, Mr. Service owed the Division sales tax in excess of $240,000 plus interest and penalty. Neither party notified the Division of this sale.

While the Division was investigating whether Mr. Service's assets would satisfy its outstanding sales tax liability, it discovered that the business was sold to plaintiff. Thereafter, the Division notified plaintiff that it was liable for $193,000 of Mr. Service's sales tax liabilities pursuant to N.J.S.A. 54:32B-22(c). This provision requires a purchaser to notify the Division, at least ten days prior to taking possession, of the purchase of all or any part of the business assets, other than in the ordinary course of business, from a person required to collect tax. Where the purchaser fails to comply with this notice requirement, the purchaser is held personally liable for the seller's sales tax liabilities.

Plaintiff challenged the applicability of N.J.S.A. 54:32B-22(c) on the grounds that it did not purchase the merchandise or inventory. The Court ruled that the statute requires a sale of either part or all of a business or a substantial portion of assets. Therefore, the sale was held to clearly fall within the statute because plaintiff purchased the business.

Hotel's Resale of Amenities

Adamar of New Jersey t/a Tropworld Casino & Entertainment Resort v. Director, Division of Taxation, 17 N.J. Tax 80, (Tax Ct., 1997) *affirmed*, Appellate Division No. A-2250-97T2 (February 5, 1999). In consolidated cases, plaintiff hotels sought sales tax refunds, under the sale-for-resale exemption, on purchases of various hotel amenities it provided to its guests including writing pads, stationery, postcards, pens, matches, sewing kits, shoeshine cloths or pads, soap, shampoo, conditioner, shower caps, lotion, shower gel and mouthwash.

On appeal, the Appellate Division affirmed the Tax Court's holding that the amenities were not sold to guests and therefore did not qualify for the resale exemption. The Tax Court found that (1) the amenities are not sold "as such" because they are "inseparably connected" to the services provided by the hotel, (2) the amenities are not sold as "a component part of a product produced for sale" because the amenities are not incorporated into the room and the room is not a product produced for sale, and (3) the sales tax imposed on the rental of a hotel room is a tax on the rental of the room, not the resale of amenities. The reasoning underlying this decision is that the "true object" concerning a room rental is the use of the room, not the acquisition of amenities.

Admission Charges

Seventeen Thirty Corp. v. Director, Division of Taxation, decided April 16, 1999; Tax Court; No. 003648-97. Plaintiff operates a retail store that sells adult-oriented books, periodicals, novelties, and videotapes. The store also contains a segregated area that contains 27 video booths where adult videotapes are viewed. Each booth contains a viewing device that displays ten to sixteen different videotapes with running times of approximately two hours. Entrance to the booth area generally required that each person purchase a minimum of twelve $0.25 tokens (three dollars worth) which transactions were not subject to sales tax. Additional tokens could also be purchased. Exceptions to the minimum purchase requirement were made for individuals known to plaintiff's employees and persons who displayed previously purchased tokens. To operate the viewing device, a patron deposited a token that provided approximately one minute of playing time. At the end of the minute, the viewing device stopped. At this point, the patron could then insert another token to view another minute. It should be noted that no more than one token could be deposited at a time. The Division determined that the token sales were taxable under N.J.S.A. 54:32B-3(e)(1), which imposes sales tax on admission charges in excess of $0.75 to or for the use of a place of amusement.

The Court ruled that the three-dollar minimum purchase requirement to enter the video booth area is taxable as an admission charge and that the video booth area is a place of amusement because the viewing devices provided en-

tertainment to the patrons. Additionally, the Court ruled that a $0.25 token deposited in the viewing device is not an admission charge because it is required only for the purpose of operating the device, not to enter the booth, and that the viewing device providing the amusement is a mechanical device, not a "place of amusement."

Sweeping Services & Garbage Removal
Exterior Power Sweeping v. Director, Division of Taxation, decided December 17, 1997; Tax Court; No. 011656-93, *rev'd*; Appellate Division; No. A-3346-97T5 (April 30, 1999). Exterior Power Sweeping (EPS) was engaged in the business of power sweeping parking lots. Essentially, on a daily to monthly basis, EPS trucks vacuumed paper products and other debris from customers' parking lots into its truck's hopper. When the hopper was full, it would either be emptied into the customer's dumpster or taken back to EPS's facility.

The Division found that EPS's services were subject to sales tax except where EPS additionally removed the debris to its own facility for disposal. Although EPS could not provide documentation showing a breakdown of the dollar amount of sales where the debris was removed to its facility, the Division estimated that it was sixty percent based upon a similar case and therefore taxed forty percent of the sales.

In an oral opinion, the Tax Court held that the power sweeping parking lot services were exempt from sales tax under the exemption for garbage removal. Furthermore, the judge voided the entire tax assessment finding that there was no factual basis for taxing forty percent of EPS's sales.

The Appellate Division reversed the Tax Court on the issue of whether sweeping services were taxable. Relying upon *D.P.S. Acquisition Corp. v. Director, Div. of Taxation*, 16 N.J. Tax 292 (Tax 1997), *aff'd*, 17 N.J. Tax 592 (App. Div. 1998), initially, the Appellate Division held that the sweeping services performed by EPS are essentially the same as those sweeping services performed by D.P.S. and are taxable. However, there was one difference between D.P.S. and EPS and that was that D.P.S. did not remove any of the collected debris from the customers' premises to its facility while EPS did. The Appellate Division ruled that those services were not taxable under the exemption for garbage removal.

As to the Division taxing forty percent of sales, the Appellate Division upheld the assessment. The Appellate Division ruled that the burden is not on the Division to justify its calculation but rather that the taxpayer carries the burden of showing that transactions are exempt from taxation. In this case, EPS did not provide any documentation that broke down the dollar amount of transactions or the number of jobs where it removed the collected debris to its premises. Therefore, the accuracy of the figure could not be tested.